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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-125

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SUPREME COURT, U.S.

OTHA G. REE, JR., and LOCKHEED SHIPBUILDING AND CONSTRUCTION COMPANY,

Petitioners,

vs.

MUNICIPAL COURT OF THE LOS ANGELES JUDICIAL DISTRICT, COUNTY OF LOS ANGELES,

and

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

ROGER ARNEBERGH
City Attorney

DAVID M. SCHACTER
Chief of the
Appellate Department

RICHARD M. HELGESON
Deputy City Attorney

Room 500
205 South Broadway
Los Angeles, Ca. 90012
(213) 485-5483

Attorneys for Respondents

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Room 500
205 South Broadway
Los Angeles, Ca. 90012
(213) 485-5483

Attorneys for Respondents

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It is respectfully submitted that the order of the California Court of Appeal correctly disposes of this case. Respondent submits that petitioners seek to ignore the factual determination by the trial judge in the case out of which this

matter arises, and that for this reason and the reasons that follow herein the petition for writ of certiorari should be denied.

STATEMENT OF THE CASE

On November 22, 1971, a misdemeanor complaint was filed against Lockheed Shipbuilding and Construction Company and Otha G. Ree, Jr. alleging that on or about July 16, 1971 defendants in that case, Municipal Court Number 402085, violated §135 of the California Penal Code and §§ 6315, 6400, 6402, 6403(c), 6404, 6406(a) and 6511 of the California Labor Code. This was the case which was labeled by petitioners as the "first prosecution."

The complaint in Case Number 402085 sets forth the trust of the prosecutions case as being that defendants, Lockheed Shipbuilding and Construction Company and Otha G.Ree, Jr. committed the following acts in the City of Los Angeles on or about July 16, 1971: . . . .

" . . . being then and there a person knowing that a matter and

thing to-wit: A Mine Safety Appliance Company Model 2-A combustible gas indicator was about to be produced in evidence upon a trial, inquiry and investigation, authorized by law did wilfully and unlawfully destroy and conceal the said combustible gas indicator with intent thereby to prevent it from being produced at said trial, inquiry and investigation."

(From Count I, People's Complaint, Case Number 402085)

" . . . entering a place being unaccompanied by a representative of the California State Division of Industrial Safety and without first obtaining written permission of the California State Division of Industrial Safety to so enter, which place was under order of the California State Division of Industrial Safety not to be entered by any person unless accompanied by a representative of the State Division of Industrial Safety and unless

written permission of the State Division of Industrial Safety was first obtained."

(From Count II, People's complaint, Case Number 402085)

" . . . entering and requiring one Arvid Rasmussen, an employee, to enter the shaft and tunnel portion of a tunnel construction project in the Sylmar area of Los Angeles, California after said tunnel and shaft portion had been inspected and determined to be unsafe by the California State Division of Industrial Safety."

(From Count III, People's complaint, Case Number 402085)

" . . . requiring and permitting one Arvid Rasmussen, an employee, to enter the shaft and tunnel portion of a tunnel construction project in the Sylmar area of Los Angeles, California, after such tunnel and shaft portion had been inspected and determined to be unsafe by the

California State Division of Industrial Safety."

(From Count IV, People's complaint, Case Number 402085)

" . . . did wilfully and unlawfully remove, displace, damage, destroy and carry off a safety device and safeguard furnished for use in an employment and place of employment to wit: One (1) Mine Safety Appliance Company 2-A combustible gas indicator."

(From Count VII, People's complaint, Case Number 402085)

" . . . did wilfully and unlawfully use and operate a place of employment after a notice of prohibition of use was attached to such place of employment by the California State Division of Industrial Safety pursuant to Section 6510 of the Labor Code of the State of California and before the said place of employment was made safe and before the required safeguards, safety appliances and devices were

provided."

(From Count VIII, People's complaint, Case Number 402085)

On March 27, 1972 a misdemeanor complaint was filed in the Municipal Court of the Los Angeles Judicial District against Lockheed Shipbuilding and Construction Company, Loren G. Savage, Otha G. Ree, Jr., Eugene Pedigo and Russell Van Guilder alleging in 80 counts that on or about June 22, 23, and 24, 1971, defendants in that case Municipal Court Number 413019 violated §§ 6416, 6400, 6401, 6402, 6404 and 6315 of the California Labor Code.

The substance of the People's case in what has been labeled by petitioner as the second prosecution, Municipal Court Number 413019, can probably be gleaned only through an independent review of the evidence which the People submitted to defendants through discovery. In arriving at his determination to deny the defendant's motions to dismiss in People v. Lockheed Shipbuilding and Construction Company, et al., Number 413019, out of which the present proceeding arises, the

trial judge was compelled to hear approximately one and one-half days of testimony, read approximately 495 pages of Assembly Subcommittee Hearings containing testimony of witnesses to be used in Case Number 413019, read 365 pages of reports submitted to the City Attorney's Office primarily by the Division of Industrial Safety containing evidence of facts upon which Case Number 413019 is based, and then to read the Reporter's Transcript of the trial of Case Number 402085 which comprised approximately 2240 pages.

Among the conduct on June 22, 23, and 24, which will be proved in the People's case, is that which is set out in the report of the prospective testimony of four of the approximately thirty-five witnesses which the People intend to call in Case Number 413019. This report was filed as part of the People's Complaint in Case Number 413019 and provides as follows:

> "Wallace Zavattero will testify: That he is employed as a safety engineer by the State Division of Industrial Safety. That pursuant to his employment he made

inspections of the San Fernando Tunnel project in the City of Los Angeles, with the Lockheed Shipbuilding and Construction Company being the contractor of the project, and dealt with Loren Savage and Otha G. Ree, Jr., Lockheed employees. That on June 23, 1971 he made an inspection of the San Fernando Tunnel and subsequent to this inspection he made numerous safety orders authorized by law which were served on Loren Savage and Otha G. Ree, Jr., and other servants and agents of Lockheed. That Loren Savage, Otha G. Ree, Jr. and Lockheed Shipbuilding and Construction Company did not comply with said orders. That on June 23, 1971, during the swing shift, Loren Savage, Otha G. Ree, Jr., and Lockheed Shipbuilding and Construction Company and each of them, permitted and required employees to work in the San Fernando Tunnel an unsafe place of employment, as a result of not complying with said orders.

"That on June 24, 1971, an explosion occurred in the San Fernando Tunnel which killed 17 persons, to wit:

ALDRICH, FORREST ELWOOD
ASHE, WILLIAM
BLAYLOCK, DANNY
CARRASCO, JOSE
CARTER, WILL
DROBOT, PAUL JOHN
DEMO, RONALD ERNEST
BALLOW, ROBERT
GUTIERREZ, MIKE
NICHOLS, GARY
OVERSTREET, RUSSEL M.
PETERS, JONATHAN V.
RICHARDSON, LOUIS
SPREEN, ALVIN
SNODGRASS, WILLIAM
STOWERS, ROBERT K.
WARNER, ROBERT

"The explosion and 17 deaths resulted from failure to comply with said orders."

(From the Complaint of Case Number 413019)

"Henry McIntyre will testify:

That on June 22, 1971, he was employed by Lockheed Shipbuilding and Construction Company and that Loren Savage and Otha G. Ree, Jr. were two of his Supervisors. That Russell Van Guilder was his immediate supervisor on the swing shift of June 22, 1971. That Russell Van Guilder permitted and required him to work in the San Fernando Tunnel, located in the City of Los Angeles, during the swing shift June 22, 1971. That he operated the mining machine during said shift. That approximately 5 hours before his shift ended he began to smell a strong odor of crude oil and gasoline. That as he excavated the odor got stronger. That the gas burned his eyes, nose and throat. That during the last hour the odor and gas made him sick. That he informed Russell Van Guilder of the above condition. That other workers complained about the gas burning their eyes, nose and throat.

That during the last hour of the shift he had to leave the machine four (4) times to get fresh air. That he knew that oil was present because he had previously worked in the oil fields and he could recognize the crude oil smell. That due to the gas and strong crude oil smell the tunnel was an unsafe place to work."

(From the Complaint of Case Number 413019)

"Arvid Rasmussen will testify:

"That on June 23, 1971 he was employed by Lockheed Shipbuilding and Construction Company and Loren Savage and Otha G. Ree, Jr. were two of his Supervisors. That Loren Savage and Otha G. Ree, Jr. and each of them required and permitted him to work in the San Fernando Tunnel, located in the City of Los Angeles, during the swing shift, June 23, 1971. That during this shift he operated a MSA 2A explosion meter while testing for explosive

gases. That he tested the atmosphere in the roof of the tunnel, first at approximately 5:30 P.M. and did not get a reading. That he tested the atmosphere on the left of the conveyor belt near the heading of the tunnel at the spring line and got a reading between 30% and 40%. That Mr. Savage was in the tunnel at the time of the reading. That he tested the atmosphere near the face of the tunnel, just above the muck and got a reading of 100%. That he also informed Mr. Savage of this reading. That he continued to test and get high readings and so informed Mr. Savage. That he informed Mr. Savage that many of these readings were over the lower explosive limit. That he did not know what type of gas he was dealing with and that samples should be taken. That Mr. Savage stated that he could take them the next day. That the atmosphere had a crude oil odor and it was very strong. That

the gas in the tunnel was burning the eyes, nose, and throat of many of the workers. That the odor and gas made several of the employees ill. That at approximately 9:30 P.M. a minor ignition occurred approximately 30 feet back from the tunnel face. The flame was approximately 3 feet long and originated between ground support segments. That the operation during the shift had been stopped numerous times due to the presence of rising gas concentration in the tunnel atmosphere. That every time the muck was moved, the odor and gas became very strong. That the gas appeared to be in the muck. That the entire tunnel and especially the heading smelled of a very strong gasoline and crude oil odor. That the tunnel was a very dangerous and unsafe place to work."

(From the Complaint of Case Number 413019)

"Ralph Brissette will testify:

"That on the graveyard shift of June 22-23 and on the graveyard shift on June 23-24 he was employed by Lockheed Shipbuilding and Construction Company as a brakeman in the San Fernando Tunnel. That his employment required him to direct trains in and out of the area of the tunnel where excavating work was taking place and to load the mine cars with excavated material. That his supervisor on the graveyard shift of the evening of June 22, 1971 and morning of June 23, 1971 was Eugene Pedigo and Loren Savage was present in the tunnel on the graveyard shift of the evening of June 23, 1971 and morning of June 24, 1971. That explosions occurred on the graveyard shifts of the morning of June 23, 1971 and the morning of June 24, 1971. That explosivemeter readings registered from 1 to 19% on the morning of June 23, 1971 and 100% on the morning of June 24.

That a wide assortment of ignition sources were present on both occasions including welding and cigarette smoking. That a strong odor of gas was present on both evenings the entire duration of the graveyard shift until both explosions occurred."

(From Complaint of Case Number 413019)

Approximately thirty additional witnesses are anticipated to be called by the People and will testify to conversations and activities which transpired on June 22, 23, and 24th in their employment, conduct of employees on the various shifts, conditions which were produced by the excavation procedure which was used, the lack of control and supervision for safety over personnel on June 22, 23, and 24th, geological conditions which should have been anticipated in excavating in the vicinity in which the San Fernando Tunnel was located, the presence of carbonasceous shales and petroliferous sedimentary rock, and various types of hydrocarbon gases,

the testing procedures, physical and chemical properties and explosive characteristics of these hydrocarbons chains.

After making a comprehensive review of all of the facts available relating to case number 413019 and all of the facts relating to case number 402085 the Municipal Court Judge in the proceeding out of which this action arises stated:

> "First of all turning to the motion under Kellett, pursuant to the Kellett decision, 654, regarding the facts in this case and the facts in the previous case arising out of the course of conduct on the 16th of July, I found that the only similarity between the two cases is that both involve the same four and a half mile, 22-foot diameter tube located in the San Fernando Valley. Very frankly, at that point in my estimation after having listened to the evidence and reading all of the material that I have indicated that I have read, I found very little similarity."

(Reporter's Partial Transcript of Proceedings of May 8, 1972.)
(Appendix "A" herein.)

The Judge in that matter then went on to enumerate, based on the facts of both cases as they were before him, the great degree of separation and large number of dissimilarities between the two cases. (See Reporter's Partial Transcript of Proceedings, pages A-4, A-5, A-6, A-7 and A-8 set forth and included infra herein.)

In both the testimony and the declarations taken before the respondent court, it was contended by the prosecutors that considering the complexity of the two cases and the great variance in the issues and proofs between the two it would have been virtually impossible to join both in a single action without undue complication. In testimony taken before the Municipal Court testimony was elicited in case number 413019 that had the two cases been attempted to be filed together they would have been subjected to an automatic motion for severance. In the hearings on the defendants' motions testimony was also

taken indicating that at the time of filing of Case Number 402085, the prosecution's preparation and assessment of the merits of Case Number 413019 was far from completion.

Thus, on May 8, 1972, the Municipal Court denied petitioners' motions to dismiss.

On May 12, 1972, petitioners filed proceedings in the Los Angeles Superior Court, No. C 29671, seeking a Writ of Prohibition to restrain the Municipal Court from proceeding with the trial of the second prosecution.

On May 15, 1972 the Superior Court denied and dismissed the petition.

On May 17, 1972 petitioners sought a Writ of Prohibition in the California Court of Appeal, 2nd Civ. No. 40323 which was denied on May 23, 1972.

A petition for hearing was filed with the California Supreme Court on or about June 2, 1972 which was summarily denied on June 29, 1972.

I

THE FIRST PROSECUTION, CASE NUMBER 402085, DOES NOT BAR PROSECUTION OF THE PRESENT CASE

The thrust of petitioners' argument, up until the present action, has been that multiple prosecution for offenses based on a continuing course of conduct should mandatorily be joined in a common action.

Petitioners have been denied recovery in the California courts where such a remedy is readily available for cases which it can properly be applied. (See Kellett v. Superior Court, 63 Cal.2d 833 (1966)).

Petitioners now seek this Court to formulate a compulsory joinder rule when, as the petitioners state, there is mere awareness as to "The basic facts underlying each and every one of the charges subsequently brought in the second prosecution." (Petition for Writ of Certiorari at p. 8.)

Petitioners have been denied recovery because the offenses charged in the second prosecution are based, NOT on the same conduct or same course of conduct, or the

same criminal episode or based on the same nucleus of facts, but on the contrary, the thrust of respondent's case in what has been termed the first prosecution is that Lockheed Shipbuilding and Construction Company, through Otha G. Ree, Jr. caused an "employment" to come into existence which was not safe, specifically:

> " . . . entering and requiring one Arvid Rasmussen, an employee, to enter the shaft and tunnel portion of a tunnel construction project in the Sylmar area of Los Angeles, California after said shaft and tunnel portion had been inspected and determined to be unsafe by the California State Division of Industrial Safety."
>
> (Taken from the complaint of case number 402085)

The charges in that case (number 402085) were based on the violation by Petitioners, Lockheed Shipbuilding and Construction Company and Otha G. Ree, Jr. of the state order which prohibited employment at the place known as the San

Fernando Tunnel. The violation of such an order constitutes a conclusive presumption of the absence of safety and constituted the prima facie case of guilt of the defendants of violations of Labor Code §§ 6400 et seq. in case number 402085.

"In any prosecution under this section, it is prima facie evidence of a violation of any such safety provision, that the accused has failed or refused to comply with any order, rule, regulation or requirement of the commission relative thereto. The burden of proof shall thereupon rest upon the accused to show that he has complied with such safety provision."

Labor Code §6414.

"All orders, rules, regulations, findings and decisions of the division made and entered under this part are admissible as evidence in any prosecution for the violation of any provisions of this part and shall in every such prosecution, be conclusively presumed to be

reasonable and lawful and to fix a reasonable and proper standard and requirement of safety unless, prior to the institution of the prosecution for such violation, proceedings for a rehearing thereon, or a review thereof, are instituted as provided in Chapter 4 of this part and not then finally determined."

Labor Code §6507 (Emphasis added)

No evidence of "dangerous levels of gas" or "inadequate ventilation" were necessary to establish the People's prima facie case in that action and, such evidence was, if admitted at all, limited to the purposes of showing why an order prohibiting employment had been imposed upon the location of the San Fernando Tunnel.

The notice of prohibition attached to the geographic location known as the San Fernando Tunnel on June 27, 1971 rendered it criminal to conduct the process of "employment" at that location. The notice of prohibition remained in effect on July 16, 1971 when Petitioners at that time

entered the forbidden area and allegedly required an employee to ply his employment of gas testing.

The notice of prohibition is commonly called a "yellow tag order" and is authorized to be imposed on a location by Labor Code §6510. The violation of such a prohibition is made criminal by Labor Code §6511. Those statutes provide in relevant part that:

> "When in the opinion of the division a place of employment, machine, device, apparatus, or equipment or any part thereof is in a dangerous condition or is not properly guarded or is dangerously placed, the use thereof shall be prohibited by the division, and a notice to that effect shall be attached thereto . . . ."
>
> Labor Code §6510.
>
> "Every person who, after such notice is attached as hereinabove provided, uses or operates any such place of employment, machine, device, apparatus, or equipment before it

is made safe and the required safeguards or safety appliances or devices are provided, or who defaces, destroys or removes any such notice without the authority of the division is guilty of a misdemeanor."

Labor Code §6511.

In addition to the yellow tag, a special order was issued by the Division of Industrial Safety under the provisions of §6313 of the Labor Code. Section 6313 provides in pertinent part:

"The division may investigate the cause of all industrial injuries resulting in disability or death which occur within the State in any employment or place of employment, or which directly or indirectly arise from or are connected with the maintenance or operation of such employment or place of employment.

"The division may make orders or recommendations with respect to the cause of such injuries which

are just and reasonable
. . . ."

Labor Code §6313.

This special order provided that no person was to be permitted to enter the proscribed portion of the San Fernando Tunnel without the presence of a representative from the State Division of Industrial Safety or without first obtaining written permission from the Division. It is this order which was to establish a prima facie case of violations of Labor Code §§ 6400 et seq. and a conclusive presumption of absence of safety in case number 402085. The conduct which was charged as violative of those Labor Code sections in case number 402085 was the act of entering the forbidden portion of the San Fernando Tunnel and requiring an employee to enter those premises and to carry on his employment process of gas testing.

The conduct charged in the present action bears no similarity to that charged in case number 402085. The conduct charged in the present case is the act of excavating and constructing a tunnel.

Not only does the "act" in the present case differ from that of case number 402085 but the objective and intent of the actor is also altogether different. In case number 402085 the objective and intent of the actor, Petitioner Ree, and Petitioner Lockheed, acting through Petitioner Ree, was to conduct a recovery operation. Upon this point all parties in case number 402085 agreed. The People contended that the actor, Petitioner Ree, entered the proscribed portion of the San Fernando Tunnel to recover a combustible gas indicator. The defendants contended that entrance was effected to recover a dead body. In the present case, the objective and intent of the actor was to construct a tunnel. Nor does the difference end in the analysis of the act or objective and intent of the actor.

The two prosecutions are based on two totally dissimilar events within which different standards of conduct applied. The standard of safety for recovery operations such as that being conducted by Petitioner Otha G. Ree, Jr. in case number 402085 differs appreciably from the

standard of safety required of actual construction and excavation operations which is applicable in the present case. In a case involving recovery operations the standard of "such freedom from danger to the life or safety of employees as the nature of employment reasonably permits" (Labor Code §6310) is obviously relaxed due to the fact that the "nature of the employment" is one which purportedly seeks for its purpose to render an employment safer, or to rescue the premises or employees from circumstances which are endangering. On the other hand an excavation or construction operation is a "nature of employment" which has no such utility and the standard for safety has an entirely different application in such construction operations from that in rescue or recovery operations.

II

THERE IS NO FEDERAL RULE OF COMPULSORY JOINDER REQUIRING PROSECUTION OF ALL CRIMINAL OFFENSES ARISING OUT OF THE SAME TRANSACTION

Petitioners claim that the underlying policies of the double jeopardy and due process clauses should be used as a basis for a compulsory joinder rule. The reasoning behind petitioner's claims arise out of the emotional, mental and economical ordeal that the individual is made to endure.

Petitioner states that this would be "without prejudice to the state or defendant." (Petition for Writ of Certiorari, p. 11.)

In the present case, as is set forth herein, the state would have been extremely burdened were it required to join the separate and independent transaction which was charged in case number 402085 to the presentation of the present case. The two separate events and the explanation of the two separate standards of safety for these two separate and individual instances would

have caused undue confusion and complication and would have deprived both parties of a fair and impartial trial by enlightened, understanding, and properly informed trial jurors. A trial of both cases would only confuse the jury in an already complicated case. Furthermore the federal test relating to joinder of distinct offenses where there is a continuous course of conduct is, whether each action would require proof of facts not required by the others. Ashe v. Swenson, 397 U.S. 436 at 446 (1970).

In the case of United States v. Miller (D.C. Pa. 1966) 250 F. Supp. 294 at 296 the court in distinguishing the double jeopardy clause from charges arising out of substantially the same events that gave rise to the previous indictment (similar to petitioner's contention) states:

> "Defendant's claim of double jeopardy turns on whether the present prosecution is essentially a relitigation of a former prosecution which failed. The same offenses may be involved in two prosecutions although they are

labeled differently. (cases cited)

"Where a new prosecution follows an acquittal, the dangers to be prevented are the harassment to the defendant and the unfairness of permitting the prosecutor a second crack at a conviction following an abortive first effort. See Abbate v. United States, 359 U.S. 187, 196-201, 79 S.Ct. 666, 3 L. Ed.2d 729 (1959) (separate opinion of Brennan, J.).

"The defendant argues that this prosecution, arising as it does out of the same acts from which the earlier prosecution arose, must necessarily be a rehash of the same issues. On this record, it cannot be said that this is so. The jury might, it is true, have acquitted Miller of the former charges because it found he was not gambling at all and thus did not accept any of the embezzled money. But it might equally have found that he was a gambler and did take the money, but was unconnected

with the embezzlement. It is impossible to know which facts were found favorably to defendant and were relied on by the jury. To conclude from the acquittal that the jury rejected the Government's evidence that defendant gambled would be at least as conjectural as concluding that it did find him to be a gambler but acquitted him on other grounds. It would also mean that even spurious and incredible defenses raised in a criminal trial would be deemed to have been resolved in defendant's favor if he gets an acquittal on any ground. The unsoundness of such a position is patent.

"The nature of the offenses charged in the present indictment and the proof required to sustain a conviction based on them are both quite different from what was involved in the earlier trial. Cf. Morgan v. Devine, 237 U.S. 632, 639, 35 S.Ct. 712, 59 L.Ed. 1153 (1915). There is no rule requiring

compulsory joinder of charges arising out of the same transaction. Compare, Note, Twice in Jeopardy, 75 Yale L.J. 262 (1965). Double jeopardy, therefore, is no ground for quashing this indictment." (Emphasis ours.)

Although this case preceded Ashe v. Swenson, 397 U.S. 436 (1970) the point that is raised and that was raised by this Court's opinion in Ashe, is that the rule of collateral estoppel in criminal cases should not be applied in a hypertechnical manner. A mandatory joinder of all criminal offenses "growing out of a single criminal act, occurrence, episode, or transaction," (Cf. the concurring opinion of Mr. Justice Brennan, Ashe v. Swenson, supra at 453, 454) would not afford a realistic or rational approach to this case.

Petitioner cites Ashe v. Swenson, supra and Green v. United States, 355 U.S. 184 (1957), both cases arising from a single act or criminal episode occurring concurrently in time. In Green, supra, the defendant was prosecuted for arson and murder

in both the first and second degree arising out of the same act. Defendant was convicted of second degree murder. Upon retrial after an appeal and reversal, he was once again retried on first degree murder. The Court, stating the basic policy behind the double jeopardy rule, reversed the second trial. In Ashe, supra, defendant purportedly robbed six (6) individuals. The prosecuting attorney attempted to conduct multiple separate trials for each of the individuals robbed. After an acquittal in the first trial defendant was tried for robbery of one of the other individuals. The Court, relying on a collateral estoppel rule, as embodied in the Fifth Amendment guaranty against double jeopardy, did not allow the second trial.

Thus, in our case, the defendants allege that there is an underlying or continuing course of conduct where actually there is, as the trial judge stated:

> " . . . regarding the facts in this case and the facts in the previous case arising out of the course of conduct on the 16th of July, I found

that the only similarity between the two cases is that both involve the same four and a half mile, 22-foot diameter tube located in the San Fernando Valley. Very frankly, at that point in my estimation after having listened to the evidence and reading all of the material that I have indicated that I have read, I found very little similarity. The first case involved the removal of evidence from the tunnel on the 16th of July and the alleged furnishing of employment that was unsafe at that particular time. The present case involves the gross negligence of defendants Ree and Savage and defendant Lockheed, alleged to have caused the deaths of 17 individuals and the safety factors that existed on the 22nd and 23rd and 24th of June, and I found in regard to the safety factors that in my mind the safety conditions are far different on the 22nd, 23rd and 24th and even on each of those

days as compared to each other as contrasted to the safety conditions that were existent in the tunnel on the 16th." (Emphasis ours.)

(Reporter's Partial Transcript of Proceedings of May 8, 1972, Appendix "A" herein)

The facts that were litigated in the first prosecution that may have to be reintroduced are the basic facts relating to the nature of the area, i.e., the tunnel, its location, etc.

This is not a relitigation of a prosecution that failed, it is merely a re-entry into evidence of basic facts. An analogous situation would be one in which an officer cited an individual during his course of employment for traffic violation on one day in one particular spot and then three weeks later cited the same individual in concert with several others during the course of their employment at the same spot for another violation. The cases should not mandatorily be joined simply because of some underlying similarity and there would

be no concept of double jeopardy that has ever been propounded by American courts that would proscribe the second prosecution. In both situations there is a similarity of offense and location but there will not be a relitigation of the same issues.

In any case, there is a similarity as to the location of the offense but the issues to be litigated and the standards of conduct to be proven are in no way identical.

III

IF A COMPULSORY RULE OF JOINDER WERE FORMULATED AS A CONSTITUTIONAL MANDATE, SUCH A RULE WOULD BE INAPPLICABLE TO THE FACTS OF THIS CASE

Petitioner is proposing an extension of the double jeopardy or due process clause that would bar subsequent prosecutions against an individual, if the prosecution does not include all criminal offenses against an individual which are known to the prosecution at the filing of the initial prosecution, if they arise out of a continuous course of conduct.

This is an extension of the rule of law proposed by Justice Brennan in the recent case of Ashe v. Swenson, 397 U.S. 436 (1970).

Justice Brennan extended the double jeopardy clause beyond the rule as established by the majority wherein an implied collateral estoppel doctrine was promulgated from the double jeopardy clause. Justice Brennan argued that if the second prosecution arose out of the same criminal episode as the first prosecution it was barred from prosecution.

In relying upon Green v. United States, 355 U.S. 184 (1957) as the basis for his decision Justice Brennan made extensive use of overly broad language wherein the state became a conglomerate of power with unlimited resources to combat a single individual. In effect, the State may have unlimited resources but the chance concentration of all of those resources upon an individual is an extremely tenuous argument to use as a basis for such a far reaching decision. In some circumstances the reverse is true, wherein the individual is able to hire an unlimited amount of

private legal counsel and the individual public attorney is not only burdened by lack of time to complete the requisite preparation for the case but is usually cramped in his legal resources and working space.

Justice Brennan does validly state that an individual should not be subject to continual embarrassment, expense and ordeal for multiple prosecutions for the "same offense". Ashe, supra, at 450.

The "same offense" being, as Justice Brennan would proffer, all acts arising out of a single criminal act, occurrence, episode, or transaction. Cf. Ashe, supra, at 453-454.

Although this is a concurring opinion, the petitioner accords considerable weight to this theory as it would, as the learned Justice states, "prohibit vexatious multiple prosecutions".

The respondent asserts that petitioner falsely places its reliance upon Justice Brennan's opinion since this would not preclude the present litigation.

Petitioner is not placed, a second time, in jeopardy on the key questions of the trial. Collateral estoppel does not operate where, as here, the second trial is on a separate cause of action and the facts upon which the second prosecution is sought to be estopped are merely evidentiary of location.

The People in this case have to prove anew each element of each different offense in the second prosecution to the satisfaction of the jury. During this process certain facts that were placed into evidence at the first prosecution will, of necessity, have to be proven at the second prosecution. But, in any case, because the tunnel is continuously there and because it is unsafe on two different occasions does not mean that the actors who enter the tunnel at these two different and distinct times have established a continuous course of conduct.

In considering a Federal Compulsory Joinder rule it will be necessary to review the various state rules presently in effect. California in the case of Kellett v. Superior Court, 63 Cal.2d 822 (1966) has established a rule whereby separate offenses that are part of an individual course of conduct where the intent and objective of the defendant are similar, shall be tried together.

The present case has been distinguished from this type of a rule with the use of the following California cases that have

defined and given specificity to the Kellett, supra, rule.

In the post-Kellett case of People v. Van Lotta (1968) 258 Cal.App.2d 329, the court disapproved an allegation of multiple prosecution based on Penal Code §654 and Neal v. State of California (1960) 55 Cal. 2d 11. In Van Lotta the defendant, a parolee, was arrested for parole violation and possession of marijuana along with three others in a house in Newport Beach. In that house in Newport Beach, in plain sight, marijuana and marijuana paraphernalia were found. Approximately six hours after the defendant's arrest the officers searched defendant's residence in Garden Grove and found approximately four more pounds of marijuana. This search was conducted to find other evidence of parole violation in connection with narcotics.

The defendant was charged, tried and convicted on August 11, 1966 for possession of marijuana with intent to sell. This conviction was for the marijuana found in Garden Grove.

On August 22, 1966, eleven days after

conviction on the Garden Grove marijuana a new and separate trial commenced on possession of the Newport Beach marijuana. The defendant was charged here with Health and Safety Code §11530 (possession of marijuana).

The defendant contended that the two offenses were part of an indivisible course of conduct and that the second trial should be barred as a multiple prosecution. The Court answered this contention by stating:

> "Defendant's intent and objective respecting the marijuana in the Garden Grove house was distinct from his intent and objective respecting the marijuana in the Newport Beach house. As to each offense the specific conduct evidencing possession was different; the purpose was different; and the subject matter of the possession was different.
>
> "It is proper to note the offense of possession of the marijuana in the Garden Grove garage was a continuing offense, occurring

through conduct constituting actual possession . . . while defendant was in the house, and through conduct constituting constructive possession while he was in Newport Beach. However, this fact does not furnish a basis for holding the possession incident to the Garden Grove offense and the possession of the marijuana in Newport Beach were parts of an indivisible course of conduct. Each offense was the product of an independent transaction.

" . . . In the case at bench the offense at Garden Grove and the offense at Newport Beach were not offenses in which the same act or course of conduct played a significant part. Noteworthy, in addition to what heretofore has been stated regarding this matter, is the fact that prosecution of the Newport Beach offense involved four defendants actually participating in or aiding and abetting the offense. Defendant's conduct

at the Newport Beach house encompasses actual possession of the marijuana in the pipe, and joint participation with the other defendants in possession of the marijuana on the table as well as aiding and abetting them in the commission of that offense."

People v. Van Lotta, supra, pp. 340, 341.

Obviously in determining the Van Lotta case, supra, the Court noticed certain facts; that each offense constituted a violation of the defendant's parole, that in each offense the subject matter was marijuana, and that although there was a six hour time span between the uncovering of the evidence for each offense, and the intent was different for each offense, the offense theoretically occurred at the same time.

The facts of the case at bar are surprisingly analogous to the facts of the Van Lotta case, supra. Instead of Otha G. Ree, Jr. and Lockheed Shipbuilding and Construction Company breaching its

obligations under parole in two separate instances, they were breaching their obligations to maintain a safe place of employment for their employees on June 22, 23, 24, 1971 and July 16, 1971.

Instead of two different pieces of marijuana there is a tunnel with two different statuses. The status on June 22, 23, and 24, 1971, was a tunnel untagged by the Division of Industrial Safety and being used for mining and excavation. However, on July 16, 1971, the tunnel was "yellow tagged" by the Division of Industrial Safety disallowing any admittance or work to be done in the tunnel without permission of the Division.

Here, like Van Lotta, supra, the intent and purpose for each offense was different. On June 22, 23, and 24, 1971, the intent of the actors was to mine and excavate. The purpose was to complete the tunnel pursuant to their contract with Metropolitan Water District. On July 16, 1971, the intent of the actors was to enter a tunnel where no mining and excavating was allowed with the purpose of either recovering a body or concealing evidence.

In Van Lotta, supra, the Court explains as a differentiating fact between the two offenses the joint participation of the three other defendants in one of the offenses and not in the other. The facts are similar here, on the June 22, 23, and 24, 1971 offenses there is joint participation by three other defendants, Loren G. Savage, Eugene Pedigo and Russell Van Guilder. On July 16, 1971, there is only Otha G. Ree, Jr. and Lockheed Shipbuilding and Construction Company.

In the cases following Kellett v. Superior Court (1966), 63 Cal.2d 822, the facts constitute the doing of one basic act that constitutes separate offenses. This one act only takes a matter of minutes to a few hours. The first and second prosecutions are against one person acting alone.

The facts in the case at bar are far different from any of those cases determined under the Kellett Rule. In this case:

(1) The acts occurred more than three weeks apart, one was June 22, 23, 24, 1971 the other was July 16, 1971.

(2) There was no activity at all in

the San Fernando Tunnel during the major part of this time period. (3) The actors, as a whole, were different on the days in question: on June 22, 23, 24, 1971, they were Russell Van Guilder, Eugene Pedigo, Loren G. Savage, Otha G. Ree, Jr. and Lockheed Shipbuilding and Construction Company; on July 16, 1971, it was only Otha G. Ree, Jr. and Lockheed Shipbuilding and Construction Company.

It is apparent that Kellett v. Superior Court, supra, was never meant to apply to this type of factual situation.

CONCLUSION

That the California rule against multiple prosecutions is broader than any constitutional proscription is obvious from a reading of the California statute and cases on the matter. It is equally obvious from a perusal of the complaints in this matter and a reading of the Reporter's Transcript of the facts and rulings by the lower court judge set out at Appendix "A" herein that

neither the national nor the state proscriptions apply to a case such as the present one.

For all of the reasons contained herein it is urged that the petition for writ of certiorari be respectfully denied.

Respectfully submitted,

ROGER ARNEBERGH,
City Attorney

DAVID M. SCHACTER,
Deputy City Attorney

RICHARD M. HELGESON
Deputy City Attorney

By: RICHARD M. HELGESON

Attorneys for Respondent.

APPENDIX A

APPENDIX A

(REPORTER'S PARTIAL TRANSCRIPT CONTAINING THE LOWER COURT'S RULING AND THE BASIS AND REASONS THEREFOR)

IN THE MUNICIPAL COURT OF LOS ANGELES JUDICIAL DISTRICT

COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

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HON. GEORGE W. TRAMMELL III, JUDGE

DIVISION NO. 2

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. LOCKHEED SHIPBUILDING AND CONSTRUCTION COMPANY, A CORPORATION DOING BUSINESS IN CALIFORNIA, LOREN G. SAVAGE, OTHA G. REE, JR., RUSSELL VAN GUILDER AND EUGENE PEDIGO, Defendants.	No. 413019

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REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS

MONDAY, May 8, 1972

(see next page)

MADELAINE NEUWIRTH, C.S.R.
Official Reporter

APPEARANCES:

For the People:	ROGER ARNEBERGH City Attorney By: ROOSEVELT DORN Chief Trial Deputy RICHARD M. HELGESON Deputy City Attorney LARRY B. MOSS Deputy City Attorney
For Defendant Lockheed:	O'MELVENY & MYERS By: DAVID G. FINKLE, Esq.
For Defendant Savage:	BALL, HUNT, HART, BROWN & BAERWITZ By: MICHAEL J. MALONEY
For Defendant Ree:	HOLLOPETER & TERRY By: DON H. TERRY, ESQ.
For Defendant Pedigo:	KARL K. RANSOM, ESQ.

(Defendant Van Guilder not present nor represented by Counsel.)

LOS ANGELES, CALIFORNIA, MONDAY, MAY 8, 1972, 10:00 A.M.

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THE COURT: This is People versus Lockheed Shipbuilding and Construction Company; Loren G. Savage; Otha G. Ree, Jr.; Eugene Pedigo.

All parties defendant are represented through counsel. People are present.

We are here for a determination of the motions by the defendants, all joined, to dismiss the 60 counts contained in the Complaint, and arriving at the decisions that I have, I have considered the voluminous points and authorities, declarations and written arguments, the testimony of Mr. Helgeson, Mr. Bane, read approximately 495 pages of Assembly subcommittee hearings, 365 pages of reports submitted to the City Attorney's office primarily by the Division of Industrial Safety, and then I have read 2,240 pages of transcript approximately of the previous trial and then heard arguments on Friday.

Let me say that I commend all attorneys for their ability and the degree of preparation on the case. It certainly has made my job much easier, and it's a

degree of ability and preparation which is very uncommon in criminal law.

As I said on previous occasions, I have, and I think with the concurrence of all parties, listed the grounds into four general categories: a motion pursuant to the Kellett decision coupled with 654 of the Penal Code, a single course of conduct barred by multiple prosecutions; two, res judicata, collateral estoppel; three, what is in the nature of a Rost motion or unnecessary delay in bringing the case to trial, i.e. actually filing the case; and lastly, lack of speedy trial violations of the defendants' Sixth Amendment rights.

I am going to take each one of them one by one and give my decision and my reasons on each of the grounds.

First of all turning to the motion under Kellett, pursuant to the Kellett decision, 654, regarding the facts in this case and the facts in the previous case arising out of the course of conduct on the 16th of July, I found that the only similarity between the two cases is that both involve the same four and a half mile, 22-foot diameter tube located in the San Fernando Valley. Very frankly, at that point

in my estimation after having listened to the evidence and reading all of the material that I have indicated that I have read, I found very little similarity. The first case involved the removal of evidence from the tunnel on the 16th of July and the alleged furnishing of employment that was unsafe at that particular time. The present case involves the gross negligence of defendants Ree and Savage and defendant Lockheed, alleged to have caused the deaths of 17 individuals and the safety factors that existed on the 22nd and 23rd and 24th of June, and I found in regard to the safety factors that in my mind the safety conditions are far different on the 22nd, 23rd, and 24th and even on each of those days as compared to each other as contrasted to the safety conditions that were existent in the tunnel on the 16th.

First of all, on the June dates the presence of individuals in the tunnel was known. There was some doubt to the extent -- number one, whether or not it was known that anybody was in the tunnel on the 16th of July, or if they were known, it was not known by very many people. There were mining operations going on in June. There

were none going on in July. Apparently, as I gethered -- at least it is somewhat alleged that the mining operations were releasing the gas and that this may have been at least part of the cause of the explosion. Also the lack of inspections at both times is far different in the degree of safety in inspection. It was far greater in my opinion on the 22nd, 23rd and 24th than it was on the 16th with regard to the entire tunnel.

The ventilation conditions on both dates were drastically different primarily because of the nonoperation of the tunnel on the 16th of July and also the damage sustained to part of the ventilation system, and I believe also, if I'm not mistaken, there was some rectifying of the reversal of the fans by that time. At least they were not able to be reversed on the 22nd, 23rd and 24th.

The damage to the tunnel is a major factor in my opinion, although I don't base my decision solely on that as to that particular ground. The tunnel was undamaged except for the minor damage caused by the flash explosion on the 23rd of June. The damage to the tunnel on the 16th as a result

of the major explosion was considerable in my opinion from what I was able to glean from the statements and the testimony.

The possibility of collapse was far greater in the tunnel on the 16th than it was on the 22nd and 23rd and up to and prior to the explosion on the 24th.

The factors of rescue and the safety factor that would go along with adequate rescue preparations were far different on the respective dates.

The electrical system in my opinion was completely different and also the debris.

I think also that in my mind as I looked at the evidence that there is cer-· tainly the inference that I draw that there was an easier proof of safety violations and lack of safety would be easier on the 16th of July than it might be on the 22nd, 23rd and 24th.

Because of the things that I have mentioned and the fact that there had been a blast which had done considerable damage to the head of the tunnel versus the lack of safety alleged to exist on the 22nd, 23rd and 24th, while I suppose a blast in and of itself might be some indication of lack of safety, I'm not convinced that that

is dispositive of the particular issue, and I think that the proof of that issue would be much more difficult than it would have been in the first case.

Also we have present in this case the element of gross negligence, which was not present in the first case, and also the element, an important element, of causation, that is, with regard to the death under 6416 of the Labor Code, which is obviously not present on the 16th. It is present here, which I think makes a material difference not only factually, but in the element of proof.

Therefore, with regard to ground No. 1, I find that it lacks merit.

Ground No. 2, res judicata, collateral estoppel. The Court finds that there is no merit to such contention of the defendants. I make no other comments. To some extent that is tied in with the reasons that I have given to the first ground.

The third and most difficult area is what is in the nature of a Rost motion, undue delay in bringing the case to prosecution, that is, the filing of the case.

I make the following findings in support of the following reasons: First of

all I find that there was no material prejudice to any of the defendants. I think that right from the very beginning the defendants knew or should have known of the possibility of these particular charges being filed. This is to me rather evident from the manner in which the subcommittee hearings of the Assembly in the early part of September and again at the latter part of September, the manner in which they were handled and some of the statements made between the members of the subcommittee and several of the attorneys and several of the witnesses.

Also I can't overlook the fact not only based on Mr. Finkle's statements to the subcommittee in September, but what is apparent to me, that Lockheed has from the very beginning conducted a massive investigation to determine the cause of the blast and whether or not in their opinion there was any violation of the safety conditions and if so, what could be done to rectify them.

Also I am not unmindful of the fact that there are, apparently from statements made here and alluded to to some extent in the written arguments, civil cases pending

or the possibility of civil proceedings or proceedings in the nature of civil actions pending and that dealing with the actual facts of this case as distinguished from the facts of the first case, which to me again revolved only about the removal of the gas tester and the alleged furnishing of an unsafe place of employment and the retrieval of that item on that date.

Also I'm not unmindful of the fact that apparently the defendant, at least the defendant Lockheed, has had at its availability methods of discovery different in this case from the ordinary criminal case in that they because of the pending civil and quasi-civil proceedings have been able to exercise or had the opportunity to exercise the use of depositions, which is ordinarily except under very unusual circumstances not afforded to either party in a criminal case.

Therefore, I find, as I say, that I don't believe there is any showing of undue or unjust prejudice to any of the defendants. I don't believe that the mere passage of time under these factual situations is sufficient for me to make such a finding.

Now, with regard to delay in initiating the prosecution, I find that such delay in my opinion was justified.

As a Judge, and one who at one time was a prosecutor, I have always felt that the charging process in the hands of the prosecutor is one of the most important functions, that charging should not be resorted to unless there is an adequate basis to file the charges. I feel that the prosecutor owes not only a duty to the public to file charges which he feels that he can sustain in a trial and not merely on mere suspicion or feeling that a charge should be filed or that a person is guilty, but that he should do so only when he feels that he has a reasonable basis for believing that he can sustain a conviction. At the same time I think a prosecutor in the charging process owes a duty to the proposed defendants not to file hastily a case that would not be supported by evidence as of that time. Certainly in this case I think this is a classic example where a hasty filing without a thorough investigation before the filing, the possibility of resulting in a not guilty verdict, and I'm not making a finding as to what I might think would be

the situation in this case, would have been not only in my opinion unfair to the individual defendants, their reputations in the industry in which they have been engaged for a long time, but certainly would have been unfair to defendant Lockheed, not only the corporation, but its shareholders.

In my opinion the case here is one of the most complex and complicated cases that I have ever seen filed in the Municipal Court and in the Superior Court. Not only is there a vast number of conflicts with some of the witnesses with regard to what I consider to be possible material aspects of the case involving the actual blast, but you have a problem as to how far you are going to go with regard to affixing responsibility, how far down the line you go, how far up the line you go, to what extent are the acts of the employees to be imputed to the corporation Lockheed. These are all very difficult areas and one on which you cannot in my opinion make hasty decisions from reading reports such as I did in the last week.

The area itself, dealing with mine safety and the geophysical aspects, the engineering aspects, certainly is ordinarily

out of the realm of the competence of any person ordinarily engaged in the field of criminal law. I feel that this is something that would have to be taken in consideration.

I therefore find that with regard to the third issue or third grounds there was no undue prejudice to the defendants and that in my opinion the delay was justified and not unreasonable.

As to the last ground, lack of speedy trial violation of the Sixth Amendment, the Court finds there is no merit to the contentions of the defendant.

Therefore, the Court finds that as to all defendants on all grounds the motions to dismiss are denied.

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IN THE MUNICIPAL COURT OF LOS ANGELES JUDICIAL DISTRICT

COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

DIVISION NO. 2 HON. GEORGE W. TRAMMELL III, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. LOCKHEED SHIPBUILDING AND CONSTRUCTION COMPANY, A CORPORATION DOING BUSINESS IN CALIFORNIA, LOREN G. SAVAGE, OTHA G. REE, JR., RUSSELL VAN GUILDER, and EUGENE PEDIGO, Defendants	No. 413019

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

I, Madelaine Neuwirth, Official Reporter of the Municipal Court, Los Angeles Judicial District, County of Los Angeles, State of California, do hereby certify that the foregoing pages 1 to 10, inclusive, comprise a true and correct partial transcript of proceedings had in the matter of the above-

entitled case, taken on May 8, 1972.

/s/ Madelaine Neuwirth
Official Reporter